In the High Court of Judicature at Madras

Dated:26.02.2007

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The Honourable Mr.Justice A.C.ARUMUGAPERUMAL ADITYAN

Second Appeal No.254 OF 1997

Subramaniyan ..Appellant/Defendant

v

Dhayalan ..Respondent/Plaintiff

This second appeal is filed U/S 100 C.P.C against the judgment and decree dated 27.10.1994 made in A.S.No.105 of 1990 on the file of the Court of the Subordinate Judge, Tindivanam confirming the decree and Judgment made in O.S.No.88 of 1989 dated 31.10.1990 on the file of the Court of the District Munsif, Gingee.

For Appellant : Mr.S.Bharathkumar
for Mr.V.S.Jagadeesan

For Respondent : Mr.T.Dhanasekaran
for Mr.N.Maninarayanan

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JUDGMENT

This appeal has been preferred against the Judgment and decree in A.S.No.105 of 1990 on the file of the Court of Subordinate Judge, Tindivanam. The defendant, who has lost his defence before the Courts below, is the appellant herein. The suit is for money under Ex A1 promissory note.

2. The averments in the plaint for the purpose of deciding this appeal sans irrelevant particulars are as follows:

The defendant has executed a suit promissory note for Rs.10,000/- for a valuable consideration on 14.11.1988 at Mettuvailamur Village. In spite of repeated demands for the return of the above said debt amount, the defendant has not repaid the same. Hence the plaintiff has issued a suit notice on 2.2.1989. The defendant had sent an earlier notice dated 27.1.1989 only to defraud the amount advanced by the plaintiff under the promissory note . The defendant has not sent

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any reply to the suit notice. The averment in the notice issued by the defendant dated 27.1.1989 are all false. The allegation that the suit promissory note was executed by the defendant on behalf of his brother-in-law Chellaperumal in connection with the land purchased by Chellapperumal(D.W.2) and thereafter a release deed was executed by Anandayeeammal, after receiving the amount towards her share are all not admitted by the plaintiff. The allegation that the suit promissory note has been discharged in lieu of the execution of the release deed is not true. There is no connection between the said release deed and the suit promissory note because the defendant himself has admitted that one week prior to 14.11.1988 ie., the issuance of notice, the suit promissory note was executed in favour of the plaintiff. The fact that the suit promissory note was executed on 14.11.1988 itself will go to show that there is no connection between the suit debt and the sale of above said lands in favour of Chellaperumal, the brother-in-law of the defendant. If the suit debt is discharged after the executiion of the release deed, then the defendant would have got back the suit promissory note from the plaintiff. There is no endorsement made by the defendant on the promissory note in lieu of the discharge of the suit debt. The above said Rajamanickam also died under suspicious circumstances. Hence the plaintiff has preferred a complaint againat the defendant and his brother-in-law Chellaperumal on account of that there was an enmity prevailing between the plaintiff and the defendant and only to defraud the plaintiff, the defendant had sent a notice dated 27.1.1989. The defendant after receiving the valuable consideration under Ex A1 had executed a suit promissory note. The defendant is liable to pay 9% interest for the suit debt, since he is an agriculturist. Hence the suit.

3. The defenant in his written statement would contend that the defendant has not received any amount under the suit promissory note dated 14.11.1988. The suit promissory note is not supported by consideration. The averment in the plaint that the defendant had borrowed Rs 10,000/- from the plaintiff in order to purchase bullock cart is not true. On 14.11.1988, no consideration passed under the suit promissory note only under the following circumstances, the suit promissory note came into existence. The plaintiff's mother-in-law Anandayeeammal had a brother by name Rajamanickam. The defendant's brother-in-law viz., Chellaperumal entered into an agreement of sale in favour of the said Rajamanickam in respect of the land in Konamangalam Village for a sale consideration of Rs.29,500/-. In pursuance of the said sale agreement , a registered sale deed was executed on 28.10.1988. After the executiion of the sale deed, the plaintiff's mother-in-law Anandayeeammal claiming that she is entitled to a share in the land purchased by Rajamanickam, threatened Chellaperumal, the vendee in order to extract money from him and only to create document, she took her brother Rajamanicka Gounder also to Mettuvailamur Village and approached the defendant in the

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presence of mediators. There was a mediation took place on 14.11.1988 in the presence of panchayatars and also in the presence of Anandayeeammal. In the panchayat, the panchayatars have decided and directed Chellaperumal to pay Rs.11,000/- to Anandayeeammal and that Anandayeeammal after receiving the said amount,executed a release deed in favour of Chellaperumal. On the date of compromise, ie., 14.11.1988, Chellaperumal had only Rs.4,000/- which he handed over to Anandayeeammal and in respect of the balance amount, the maternal uncle of Chellaperumal viz., the defendant came forward to execute the promissory note for Rs.10,000/- as a guarantor. The plaintiff has also agreed to the said course. Only under such circumstances, the defendant had executed the suit promissory note in favour of the plaintiff. Later, the brother-in-law of the defendant, viz., Chellaperumal proceeded to Konamangalam with the balance amount of Rs.7,000/- and handed over the same to Anandayeeammal and also obtained a release deed from her as agreed to between the parties before the Panchayatars. When the defendant asked Anandayeeammal to return the suit promissory note,she gave some lame excuse for the return of the same . The defendant waited for nearly two months and thereafter issued a notice on 27.1.1989 to Anandayeeammal to direct the plaintiff to return the suit promissory note. The plaintiff had sent a reply raising false contentions and only to get wrongful gain, the suit has been filed by the plaintiff. The defendant is not liable to pay any amount under the suit promissory note. The plaintiff has not stated in the suit notice that the suit promissory note was executed one week prior to the date of mediation ie., on 14.11.1988. Only at the instance of Anandayeeammal, the suit promissory note was executed by the defendant in favour of the plaintiff. This fact was also stated in the notice issued by the defendant to the plaintiff. Anandayeeammal is also a necessary party to the suit. Hence the suit is liable to be dismissed.

4. On the above pleadings, the learned trial Judge has framed three issues for trial. The plaintiff has examined himself as P.W.1 and exhibited Exs A1 and A2. The first defendant has examined himself as D.W.1 besides examining another witness as D.W.2.(it is wrongly mentioned in the printed copy of the judgment of the trial Court and also in the fair copy of the Judgment that no witness was examined on the side of the defendant). Ex B1 notice dated 27.1.1989 was marked on the side of the defendant.

5. After considering both the oral and documentary evidence let in before the trial Court, the learned trial Judge has come to a conclusion that the plaintiff is entitled to the relief asked for in the plaint and consequently, decreed the suit with costs as prayed for, giving six months time to the defendant to discharge the suit amount. Aggrieved by the Judgement of the learned trial Judge, the defendant has preferred an appeal in A.S.No.105 of 1990 before the Subordinate Judge, Tindivanam. The learned first appellate Judge has

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also dismissed the appeal thereby confirming the decree and Judgment of the learned trial Judge. The learned first appellate Judge also dismissed I.A.No.98 of 1992 filed by the defendant to receive the additional documents. Against the findings of the learned first appellate Judge, the defendant has preferred this second appeal.

6. The substantial questions of law involved in this appeal are

> " 1. Whether the Courts below are right in dismissing I.A.No.98 of 1992 in A.S.No.105 of 1990.I.A.No.98/1992 was filed by the appellant to receive the release deed and sale deed as additional documents?
> 2. Whether the Courts below have given importance to the admission made on behalf of the respondent regarding the release deed etc.,?
> 3. Whether the Courts below have considered the aspecpt of burden of proof correctly?

7. Heard Mr.S.Bharathkumar, learned counsel appearing for the appellant and Mr.T.Dhanasekaran, learned counsel appearing for the respondent and considered their respective submissions.

8.The Points:

The entire case of the appeal revolves on Ex B1 notice dated 27.1.1989 sent to the plaintiff Dhayalan and his mother-in-law Anandayeeammal. Accoding to the defendant, Ex A1 promissory Note was not supported by consideration, but the same was executed by him, as a guarantor for his brother-in-law Chellaperumal, who had purchased the land from one Rajamanickam,the brother of Anandayeeammal in Survey Nos.158/2,167/2,166,200/7C,167/4, and Natham Survey No.196 in Konamangalam Village and that a registered sale deed was executed by Chellaperumal in favour of Rajamanickam for a sale consideration of Rs.25,500/-. Subsequent to the execution of the sale deed, Anandayeeammal, the sister of Rajamanickam went to Konamangalam Village and threatened Chellaperumal claiming that she is also having a share in the properties sold to him under the sale deed dated 28.10.1988. In connection with this, a panchayat was held at Mettuvailamur Village in the presence of panchayatars wherein it has been decided by the panchayatars that Chellaperumal has to pay a sum of Rs.11,000/- to Anandayeeammal and after receiving the said amount, the said Anandayeeammal had to execute a release deed and that since Chellaperunmal had only Rs.4,000/-, he paid the same to Anandayeeammal and for the balance of Rs.7,000/- , he had agreed to pay the same within one or two weeks and only as a guarantor, the suit promissory note for Rs.10,000/- was executed by the defendant for Chellaperumal in favour of the plaintiff Dhayalan.

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9. The other part of the defence by the defendant is that on 14.11.1988 itself in the presence of witnesses, the said Chellaperumal had paid the balance of Rs.7,000/- to Anandayeeammal and got the release deed from her in respect of her claim over the properties sold in favour of Rajamanickam by Chellaperumal. But the said release deed was not produced before the trial Court. Only before the first appellate Court, the said document was filed along with I.A.No.98 of 1992. But the learned first appellate Judge has dismissed I.A.No.98 of 1992 on the ground that EX A1 was executed for Rs.10,000/- and there was no sufficient reason given by the petitioner for non productiion of the said document before the trial Court to mark the same by examining the relevant witness. Further the said document was not a registered one. The defendant has also not examined Anandayeeammal before the trial Court to prove the said release deed. Further if the release deed is true and genuine, then immediately the defendant would have issued notice to the plaintiff demanding the return of Ex A1 promissory Note. Ex B1 notice is dated 27.1.1989 . There is no acceptable reasoning given in Ex B1 notice for the delay in sending Ex B1 even after the execution of the alleged release deed dated 14.11.1988. If the payment of Rs.7,000/- to Anandayeeammal by Chellaperumal was true then the defendant ought to have issued notice to Chellaperumal and also for return of the promissory note by the plaintiff. Under such circumstances, the findings of the learned first appellate Court regarding the dismissal of I.A.No.98/1992 does not require any interference from this Court.

10. If we come to Ex A1 promissory note, the defendant has admitted in Ex B1 notice itself that only for a sum of Rs.7,000/-, Ex A1 was executed by him in favour of Dhayalan as a guarantor for the amount to be paid by his brother-in-law Chellaperumal in favour of the plaintiff. The plaintiff as P.W1 would also admit Ex B1 notice. Nodoubt under Section 118 of the Negotiable Instruments Act,the presumption under Ex A1 is that it was executed for a valuable consideration but under Section 118(g) of the Negotiable Instruments Act , it is only a rebuttal presumption, if the defendant is able to prove that a fraud has been played upon in executing the promissory note then the earlier presumption under Section 118 Negotiable Instruments Act cannot be sustainable. Section 118(g) of the said Act runs as follows:

> " That holder is a holder in due course-that the holder of a negotiable instruments is a holder in due course, provided that where the instrument has been contained from its lawful owner, or from any person in lawful custody there of, by means of an offence or fraud or has been obtained from the maker or acceptor thereof by reasons of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder

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in due course lies upon him."

11. A mere reading of recitals in ExA1 promissory note will go to show that no consideration was passed on the date of execution of EX A1 promissory note. The exact recitals in Ex A1 runs as follows:

"என் அவசர நிமித்தம் வண்டிமாடு வாங்குவதற்காக முனனோடியாக ரொக்கம் பெற்றுக் கொண்ட தொகை ரூ 10,000/-. இந்த பத்தாயிரமும் பெற்றுக் கொண்டபடியால், மாதம் ஒன்றுக்கு வட்டி 1% வீதம் ஏறிய வட்டியும் அசலும் தங்களுக்காகவது தங்கள் உத்தரவு, பெற்றவர்களுக்காகவது கொடுத்து விடுவேனாகவும் ."

From the evidence of D.W.2, it is clear that under Ex A1, only a sum of Rs.7,000/- was passed towards consideration. D.W.2 is Chellaperumal. Only for him, the defendant had executed EX A1 in favour of the plaintiff for the said amount. D.W.2 is liable to pay the amount to Anandayeeammal in respect of the land purchased by him from Rajamanickam, the brother of Anandayeeammal. But D.W.2 would depose that he repaid the said amount of Rs.7,000/- to Anandayeeammal and obtained a release deed. But on the date of examination before the trial Court, D.W.2 has not produced the said release deed. So under such circumstances, the inference will be that EX A1 is valid for a sale consideration of Rs.7,000/- and there was no release deed executed by Anandayeeammal in favour of D.W.2 Chellaperumal in discharge of the debt under Ex A1. Under such circumstances, I am of the view that the Courts below have erred in decreeing the suit for Rs.10,000/- with future interest under Ex A1 because in my opinion Ex A1 is valid only for Rs.7,000/-. Under such circumstances, this Court is necessarily to inferfere with the findings of the learned trial Judge in respect of the amount as indiciated above. The points are answered accordingly.

12. In fine, the appeal is allowed in part and decree and Judgment of the first appellate Court in A.S.No.105 of 1990 on the file of the Court of Subordinate Judge, Tindivanam,is set aside and the suit is decreed for Rs .7,000/- with 9% interest per annum from the date of the suit till the date of decree and with future interest at the rate of 6% per annum from the date of decree till the date of realisation on the principle amount with proportionate costs. Time for payment two months.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1. The Subordinate Judge, Tindivanam.(with records if any)
2. The District Munsif, Gingee
3.The Section Officer, VR Section,
High Court, Madras.

+1cc to Mr.V.S.Jagadeesan, Advocate Sr 11566

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km/28.3.

Second Appeal No.254/1997

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